A **MUHAMMAD SHUKRI ABDULLAH**

v.

CIMB ISLAMIC BANK BHD

B HIGH COURT SABAH & SARAWAK, KUCHING
RAVINTHRAN PARAMAGURU JC
[ORIGINATING SUMMONS NO: 24A-26-2009-II]
10 MARCH 2010

C ***BANKING:*** *Banker and customer - Freezing of account - Order made by public prosecutor pursuant to s. 37(1) Malaysian Anti Corruption Commission Act 2009 - Whether a valid and subsisting order - Declarations sought for freezing of account to be null and void - Whether would nullify s. 37(1) order - Malaysian Anti Corruption Commission Act*
D *2009, ss. 37(2), (3)(ii)*

BANKING: *Banker and customer - Freezing of account - Declarations - Application for declaration freezing of account null and void - Whether court could grant declaration directly affecting rights of third party not*
E *before the court - Whether court should grant declaratory orders sought in view of s. 37(ii) Malaysian Anti Corruption Commission Act 2009*

CIVIL PROCEDURE: *Judgments and orders - Declarations - Filing for - Failure to join public prosecutor and the Malaysian Anti Corruption Commission Act 2009 as party to application - Whether application*
F *dismissed*

The plaintiff, a sole proprietor trading under the name and style of Perusahaan Sama Enterprise, was a customer of the defendant, a bank. The plaintiff had deposed in his affidavit that a computer
G printout of the inquiry status of his account showed a balance of RM682,564.94 on 14 December 2009. However, the account's status was indicated as frozen. The plaintiff thus applied for two declaratory orders: (a) a declaration that the freezing of the plaintiff's account was null and void and of no legal effect and (b) a
H declaration that the plaintiff was entitled to operate the said account freely without restriction. The bank's defence was that on 1 December 2009, the Malaysian Anti Corruption Commission Act 2009 (the MACC Act) had served an order to freeze the plaintiff's account. The order was made under s. 37(1) of the Malaysian Anti
I Corruption Commission Act 2009 (the MACC Act) by the public prosecutor. The defendant opposed the application of the plaintiff on the ground that they would be exposed to the penal provision of

s. 37(3) of the MACC Act if they did not comply with the order of the public prosecutor. The issues that arose were (i) whether the court could grant a declaration which would directly affect the rights of a third party who was not before the court and (ii) whether the court should grant the declaratory orders sought in view of s. 37(ii) of the MACC Act.

Held (dismissing the application):

(1) The plaintiff had not sought to quash the order of the public prosecutor under s. 37(1) of the MACC Act by way of judicial review. He had also not sought to join the public prosecutor or the MACC as a party to the instant application. In the event the prayers sought were granted, the order of the public prosecutor under s. 37(1) of the MACC Act would be practically frustrated. It is a principle of law that, save for exceptional reasons, parties whose interests are affected or prejudiced by a declaratory order should be joined as parties. The assertion of the defendant in the affidavit in opposition that the plaintiff was orally notified of the s. 37(1) order was not rebutted. Therefore, the plaintiff had notice in respect of the role of the MACC or the public prosecutor in freezing his account. The plaintiff still elected to file this action for declaratory orders against the defendant without joining the MACC or the public prosecutor. On this ground alone, the application should be dismissed. (paras 6 & 9)

(2) The defendant, as a bank, was merely complying with s. 37(1) of the MACC Act in freezing the account of the plaintiff. The order was made by the public prosecutor in the exercise of his statutory power pursuant to s. 37(1) and was a valid and subsisting order. Failure to comply with this order on the part of the defendant would attract the penal liability provided in s. 37(3). Subsection (2) states a bank will not be liable on account of compliance with an order under sub-s. (1) to any proceedings or claim by virtue of any law or contract. To all intents and purposes, this provision clothes the bank with immunity from any criminal or civil proceeding if they complied with a s. 37(1) order. Even if the court were to grant the declarations sought, it would not have the effect of nullifying the s. 37(1) order as the plaintiff had not applied to quash the said order by way of judicial review or other court process. (para 10)

[Plaintiff to pay costs of the defendant.]

Case(s) referred to:
Datuk Syed Kechik Syed Mohamed v. Government of Malaysia & Anor [1978] 1 LNS 44 FC ***(refd)***
Majumder v. Attorney General of Sarawak [1966] 1 LNS 97 FC ***(refd)***
Petaling Tin Bhd v. Lee Kian Chan & Ors [1994] 2 CLJ 346 SC ***(refd)***
London Passenger Transport Board v. Moscrop [1942] AC 332 ***(refd)***

Legislation referred to:
Malaysian Anti Corruption Commission Act 2009, s. 37(1), (2), (3), (ii)
Specific Relief Act 1950, s. 41

For the plaintiff - Lim Heng Choo; M/s Lim & Lim Advocates
For the defendant - Desmond Sahathevan; M/s Battenberg & Talma Advocates

Reported by Suhainah Wahiduddin

JUDGMENT

Ravinthran Paramaguru JC:

Brief Facts

[1] This is an application by the plaintiff for two declaratory orders. The brief uncontested facts may be stated as follows. The plaintiff is a customer of the defendant who is a bank. The plaintiff is a sole proprietor trading under the name and style of Perusahaan Sama Enterprise. The plaintiff has deposed in his short affidavit that a computer printout of the inquiry status of his account showed a balance of RM682,564.94 on 14 December 2009. However, the account's status was indicated as frozen. The plaintiff now prays for the following orders:

(a) a declaration that the freezing of the plaintiff's account No. 1101 00000 35105 is null and void and of no legal effect;

(b) a declaration that the plaintiff is entitled to operate the said account freely without restriction, prohibition and/or any hindrance whatsoever including withdrawal of all or/any of the money deposited therein and/or closing of the said account.

Response Of The Defendant

[2] The affidavit in opposition of the defendant was sworn by its branch manager, Steven Teo Sang Nguang. He did not deny the fact that that the plaintiff is an account holder and that there is a balance of RM682,564.94 in the account of the plaintiff. He also did not deny the fact that the defendant had frozen the said

account. However, the bank's defence is that on 1 December 2009, the Malaysian Anti Corruption Commission (MACC) had served an order to freeze the plaintiff's account. The order was made under s. 37(1) of the Malaysian Anti Corruption Commission Act 2009 (the MACC Act) by the public prosecutor. He said that the plaintiff was orally notified of the said order. A copy of the said order is exhibited in the affidavit in opposition. The defendant is opposing the application of the plaintiff on the ground that they would be exposed to the penal provision of s. 37(3) of the MACC Act if they do not comply with the order of the public prosecutor.

Issues

[3] The nature of the order sought by the plaintiff is a declaration. Section 41 of the Specific Relief Act 1950 vests the High Court with the power to grant declaratory decrees to any person entitled to any legal character, or to any right as to any property (see also the cases *Datuk Syed Kechik Syed Mohamed v. Government of Malaysia & Anor* [1978] 1 LNS 44 and *Petaling Tin Bhd v. Lee Kian Chan & Ors* [1994] 2 CLJ 346). The purpose of the declaratory order is to clarify and declare a legal right. In the instant case, the defendant has not disputed the fact that the plaintiff is an account holder and that the monies in the account belong to the plaintiff. Therefore, there is no question as to the legal right of the plaintiff to the monies in the account. However, the plaintiff is not merely seeking for an order to declare his right to the monies in question. He is asking for a declaration that the freezing of the account by the defendant is null and void and of no legal effect. He is also asking for a declaration that he is entitled to operate the account freely without restriction including the right to withdraw the monies in question. The plaintiff has not disputed the fact that the defendant has been served with an order under s. 37(1) of the MACC Act. The plaintiff has also not disputed the averment of the defendant that he was orally notified of the said order.

[4] The issues that arose in this application are:

(1) Whether the court can grant a declaration which would directly affect the rights of a third party who is not before the court?

(2) Whether the court should grant the declaratory orders sought in view of s. 37(ii)?

[5] Before I proceed further, for ease of reference, I shall set out s. 37 of the MACC Act below:

> 37. Order not to part with, deal in, movable property in bank, etc.
>
> (1) Where the Public Prosecutor is satisfied on information given to him by an officer of the commission that any movable property, including any monetary instrument or any accretion thereto, which is the subject matter of an offence under this Act or evidence in relation to the commission of such offence, is in the possession, custody or control of a bank, he may, notwithstanding any other written law or rule of law, by order direct the bank not to part with, deal in, or otherwise dispose of such property or any part thereof until the order is revoked or varied.
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> (2) A bank or any agent or employee of a bank shall not, on account of such compliance, be liable to any prosecution under or by virtue of any law or to any proceeding or claim by any person under or by virtue of any law or under or by virtue of any contract, agreement, or arrangement, or otherwise.
>
> (3) A person who fails to comply with an order of the Public Prosecutor under subsection (1) commits an offence and shall on conviction be liable to a fine not exceeding two times the amount which was paid out in contravention of the Public Prosecutor's order or fifty thousand ringgit, whichever is the higher, and to imprisonment for a term not exceeding two years.
>
> (emphasis added)

[6] The plaintiff has not sought to quash the order of the public prosecutor under s. 37(1) by way of judicial review. He has also not sought to join the public prosecutor or the MACC as a party to the instant application. In the event the prayers sought are granted, the order of the public prosecutor under s. 37(1) of the MACC Act would be practically frustrated. It is a principle of law that, save for exceptional reasons, persons whose interests are affected or prejudiced by a declaratory order should be joined as parties (see *Majumder v. Attorney General of Sarawak* [1966] 1 LNS 97 FC and *London Passenger Transport Board v. Moscrop* [1942] AC 332. In *London Passengers Transport Board v. Moscrop (supra)*, the House of Lords said as follows in respect of an application for a declaratory order that would affect a third party:

> the courts have always recognised that persons interested are or may be indirectly prejudiced by a declaration made by the court in their absence, and that, except in very special circumstances, all persons

> interested should be parties, whether by representation order or otherwise, before a declaration by its terms affecting their rights is made.

[7] This decision was followed in Malaysia in *Majumder v. Attorney General of Sarawak (supra)*. In that case, the plaintiff sought a declaration in respect of eligibility for designation as a "designated officer" under the Sarawak Overseas Service Ordinance No. 15 of 1961. The authority having the power to make such a designation was the British Secretary of State. However, he was not a party to the action. At the High Court, the declaration was granted. The defendant appealed and the Court of Appeal allowed the appeal of the defendant. Harley, Acting CJ (Borneo) said as follows when commenting the propriety of seeking a declaration that would affect a third party:

> It seems to me that these grounds of appeal are incontestable. The courts should not make declarations which concern persons interested but not joined as parties (*London Passenger Transport Board v. Moscrop* [1942] AC 332 and *Threw v. Attorney General* [1936] 2 All ER 1325). It is impossible for the defence through the Attorney-General of Sarawak to represent, still less to bind, Her Majesty's Government in Britain.

[8] On further appeal to the Privy Council, the decision of the Court of Appeal was affirmed. Lord Guest said as follows:

> The Secretary of State is not a party to these proceedings and moreover it is entirely within his discretion as to whether he designates an officer as such or not. He would not be compelled to do so. Their Lordships therefore conclude that the Federal Court were right in dismissing the appellant's appeal on this declaration.

[9] Similarly, the grant of the declaratory orders sought in the instant case would affect the public prosecutor's order to freeze the bank account of the defendant. Counsel for plaintiff argued that there was no duty on the part of the plaintiff to join MACC or the public prosecutor as defendant in this action as the plaintiff was not served with the said order. In my opinion, this argument cannot prevail over the principle of law discussed above. The assertion of the defendant in the affidavit in opposition that the plaintiff was orally notified of the s. 37(1) order was not rebutted. Therefore, the plaintiff had notice in respect of the role of the MACC or the public prosecutor in freezing his account. The plaintiff still elected to file this action for declaratory orders against the defendant without joining the MACC or the public prosecutor. On this ground alone, the application should be dismissed.

[10] Counsel for defendant argued that the application should not be granted for the following reason. The defendant, as a bank, was merely complying with s. 37(1) of the MACC Act in freezing the account of the plaintiff. There is much force in this argument. The s. 37(1) order made by the public prosecutor has not been set aside or challenged by plaintiff. The order was made by the public prosecutor in the exercise of his statutory power pursuant to s. 37(1). It is therefore a valid and subsisting order. Failure to comply with this order on the part of the defendant would attract the penal liability provided in s. 37(3). In fact, the widely worded sub-s. (2) provides the perfect defence to this action. Sub-section (2) states a bank will not be liable on account of compliance with an order under sub-s. (1) to any proceedings or claim by virtue of any law or contract. To all intents and purposes, this provision clothes the bank with immunity from any criminal or civil proceeding if they complied with a s. 37(1) order. There is also a further reason to refuse the application. Even if the court were to grant the declarations sought, it would not have the effect of nullifying the s. 37(1) order. The reason is that the plaintiff had not applied to quash the said order by way of judicial review or other court process. In such a situation, the defendant would be caught between a rock and a hard place. The defendant would have to choose between committing contempt of court or committing an offence under s. 37(3).

[11] For all the above reasons, I dismiss the application. Counsel for plaintiff urged me to exercise my discretion to order the parties to bear their own costs. Counsel for defendant prayed for costs as the defendant was brought to court through no fault of their own and for complying with the provisions of s. 37 of the MACC Act. In my opinion, as the plaintiff had notice why the account was frozen, he should have taken steps to quash the s. 37(1) order instead of suing the defendant who was obliged by law to comply with the said order. Furthermore, sub-s. 3 of s. 37 of the MACC Act clearly states that no proceeding will lie against a bank or its agent or employee on account of obeying an order made under sub-s. (1). Therefore, the defendant should not have been put to the unnecessary legal expense of defending this action. In the premises I order the plaintiff to pay the costs of the defendant.